BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEAN A. JOHNSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 165,143
GATES RUBBER COMPANY	)	
Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY OF NEW YORK	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requested review of the Award dated June 5, 1995, entered by Administrative Law Judge John D. Clark.

APPEARANCES

Carlton W. Kennard of Pittsburg, Kansas, appeared for the claimant. Robert V. Talkington of Iola, Kansas, appeared for the respondent and its insurance carrier. Gilbert Gregory of Fort Scott, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record reviewed by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits based upon a 5 percent whole body functional impairment. Also, the Administrative Law Judge denied claimant's request for temporary total disability benefits. Claimant requested review of the following issues:

(1) Nature and extent of injury and disability.

(2) Claimant's entitlement to temporary total disability benefits.

Those are the only two issues before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be modified.

(1) The Appeals Board agrees with the Administrative Law Judge's finding that claimant sustained personal injury by accident arising out of and in the course of employment with the respondent over a period of time culminating on claimant's last day of work on July 11, 1991. Claimant began working for the respondent in 1979 performing job duties that required repetitive use of the

hands and arms along with continuous lifting and handling of hydraulic hose weighing 50 pounds or more. Company doctor Richard L. Hull, D.O., and claimant's medical expert witness, neurologist Bernard M. Abrams, M.D., diagnosed claimant as having fibromyositis affecting her left arm, shoulder, neck, and back. Both doctors believed that claimant's repetitive work activities either caused or aggravated her injury.

The Appeals Board also agrees with the Administrative Law Judge's conclusion that claimant has sustained a 5 percent whole body functional impairment as a result of the work-related injuries. In reaching that conclusion, the Administrative Law Judge considered the opinions of both Dr. Abrams and Dr. Hood regarding claimant's whole body functional impairment.

Because hers is an "unscheduled" injury, the computation of permanent partial general disability benefits is governed by K.S.A. 1991 Supp. 44-510e, which provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Administrative Law Judge limited claimant's permanent partial general disability benefits to the functional impairment rating based upon the finding that claimant had refused to attempt to perform an accommodated job that respondent had offered. In support of that finding, the Administrative Law Judge cited Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), which held in part:

> "Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further,

it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system."

The Appeals Board finds that the facts in this proceeding are distinguishable from the Foulk case and, therefore, claimant's permanent partial disability benefits are not limited to the functional impairment rating. It may be true that in October or November 1991 respondent's medical safety technician, Cindy Ranabarger, spoke with claimant about an accommodated position which consisted of relabeling boxes. However, as indicated by Ms. Ranabarger that position was temporary and would only last approximately six weeks. At the time of their conversation, claimant told Ms. Ranabarger that she did not believe that she was capable of returning to work at that time nor did she believe the doctors would permit it. Also, about that same time Ms. Ranabarger contacted the company doctor about the propriety of the accommodated job but the doctor did not release claimant to work. A review of the company doctor's notes during that approximate time period indicates claimant was unable to return to work. Further, in December 1991 Dr. Hull wrote Ms. Ranabarger to advise that claimant was not able to return to work at respondent's plant at that time. The foregoing facts do not constitute an unreasonable refusal to attempt an accommodated job as were the operative facts in Foulk.

The Appeals Board finds that claimant has a 38 percent loss of ability to perform work in the open labor market. Dr. Abrams, a neurologist, testified that claimant should only lift 10 pounds occasionally; never lift more than 20 pounds; should avoid overhead lifts; should only bend, stoop, and squat occasionally; should not twist, kneel, or crawl; should only stand one hour at a time but only two hours in total; and should sit only two hours at a time. Based upon those restrictions claimant's economist, Stephen Sturdevant, Ph.D., testified that claimant had a 76 percent loss of ability to perform work in the open labor market. On the other hand, respondent's medical expert witness, orthopedic surgeon Roger W. Hood, M.D., testified that claimant had no orthopedic reason which would require any medical restrictions. That, in turn, would indicate that claimant has no loss of ability to work. The Appeals Board finds the truth lies somewhere between those two doctors' opinions. The 38 percent loss found by the Appeals Board, as indicated above, is derived by averaging the 76 percent loss of ability to perform work in the open labor market utilizing Dr. Abram's medical restrictions and the zero percent loss considering Dr. Hood's opinions.

The Appeals Board finds that claimant has sustained a 47 percent loss of ability to earn a comparable wage as a result of the work-related injury. That conclusion is based upon the fact that claimant has obtained a job earning $5.50 per hour as a teaching assistant. Although claimant now only works 31 hours per week, there appears no reason to doubt that claimant does not have the ability to work full time or 40 hours per week at that hourly rate. Therefore, the Appeals Board finds that claimant

retains the ability to earn $220 per week which constitutes a 47 percent loss of ability to earn a comparable wage when compared to the stipulated average weekly wage of $415.60.

To determine permanent partial general disability benefits, K.S.A. 1991 Supp. 44-510e requires the fact finder to consider both the 38 percent loss of ability to perform work in the open labor market and the 47 percent loss of ability to earn a comparable wage. Because there appears no valid reason to afford one loss greater weight than the other, the Appeals Board averages those percentages and finds that claimant has a 43 percent work disability for which she should receive permanent partial disability benefits.

(2) The Administrative Law Judge did not provide any reason for denying claimant's request for temporary total disability benefits. Nevertheless, the Appeals Board agrees with the Administrative Law Judge's denial. Although listed by claimant as an issue at the time of taking stipulations, the parties did not address that issue with Dr. Hull who treated claimant during the period in question and who would logically know the period claimant was temporarily and totally disabled. Also, the other doctors who testified did not address that issue. The Appeals Board finds that claimant has failed in her burden of proof on that issue.

(3) The Appeals Board adopts the findings and conclusions set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated June 5, 1995, should be, and hereby is, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jean A. Johnson, and against the respondent, Gates Rubber Company, and its insurance carrier, National Union Fire Insurance Company of New York, for an accidental injury which occurred July 11, 1991, and based upon an average weekly wage of $415.60 for 415 weeks of permanent partial work disability compensation at the rate of $119.14 per week for a 43% work disability, making a total award of $49,443.10.

As of November 22, 1996, there is due and owing claimant 280.14 weeks of permanent partial work disability compensation at the rate of $119.14 per week in the sum of $33,375.88. The remaining balance of $16,067.22 is to be paid for 134.86 weeks at the rate of $119.14 per week, until fully paid or further order of the Director.

Claimant may request additional medical care and treatment upon proper application to the Director.

Pursuant to stipulation, the Workers Compensation Fund is assessed 25% of the liability associated with this award.

The Appeals Board hereby adopts the remaining orders of the Administrative Law Judge as set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Pittsburg, KS
Robert V. Talkington, Iola, KS
Gilbert Gregory, Fort Scott, KS

John D. Clark, Administrative Law Judge
Philip S. Harness, Director